

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. ROTH, JR.,	§
	§ No. 306, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9901000330
	§
Plaintiff Below-	§
Appellee.	§

Submitted: February 10, 2006

Decided: May 2, 2006

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

**ORDER**

This 2<sup>nd</sup> day of May 2006, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Richard F. Roth, Jr., filed an appeal from the Superior Court's June 13, 2005 order denying his motion for postconviction relief and his motion for the appointment of counsel. We find no merit to the appeal. Accordingly, we affirm.

(2) In June 2000, a Superior Court jury found Roth guilty of two counts of Murder in the First Degree, four counts of Robbery in the First Degree, three counts of Conspiracy in the Second Degree, and six counts of Possession of a Firearm During the Commission of a Felony. He was

sentenced to two life sentences, plus 188 years of Level V incarceration. On direct appeal, this Court affirmed Roth's convictions and sentences.<sup>1</sup>

(3) In this appeal, Roth claims that: a) the Superior Court erred by deciding his motion for postconviction relief before the filing of his reply brief; b) at trial, the Superior Court erred by failing to investigate the violation of its witness sequestration order, conduct voir dire regarding racial bias on the part of potential jurors, properly instruct the jury regarding the voluntariness of witness statements, and render consistent rulings regarding the admissibility of witness statements; c) at trial, the State intentionally violated the witness sequestration order and engaged in discovery violations; and d) his counsel provided ineffective assistance.

(4) The record reflects that, on September 13, 2004, Roth filed a motion for postconviction relief in the Superior Court. On February 7, 2005, the Superior Court ordered the Department of Justice to respond to the motion<sup>2</sup> and ordered Roth's two defense attorneys to respond by affidavit to Roth's allegations of ineffective assistance of counsel.<sup>3</sup> Following receipt of

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<sup>1</sup> *Roth v. State*, 788 A.2d 101 (Del. 2001).

<sup>2</sup> Super. Ct. Crim. R. 61(f).

<sup>3</sup> Super. Ct. Crim. R. 61(g) (2).

the State's response to Roth's motion on April 26, 2005, the Superior Court filed its order denying the motion.<sup>4</sup>

(5) Roth's first claim is that the Superior Court erred by deciding his motion for postconviction relief before the expiration of the 30-day period for filing his reply brief.<sup>5</sup> Roth alleges that he signed his reply brief on May 27, 2005, but the Superior Court docket does not reflect that the brief was ever filed. Thus, no prejudice was suffered by Roth as a result of the Superior Court's failure to wait until the 30-day period had expired before issuing its decision. Moreover, we have reviewed the arguments Roth contends would have been included in his reply brief and do not find that those arguments would have altered the decision of the Superior Court on Roth's motion for postconviction relief. Thus, no prejudice was suffered by Roth as a result of the Superior Court's failure to review Roth's reply brief.

(6) Roth's second claim is that the Superior Court committed error at trial in the questions posed during jury voir dire, in the instructions to the jury and in various evidentiary rulings. None of these claims was raised in the proceedings leading to the judgment of conviction. As such, these

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<sup>4</sup> The Superior Court docket sheet does not reflect the filing of defense counsels' affidavits, although the Superior Court mentions them in its decision and Roth states in his opening brief that he has copies of them.

<sup>5</sup> Super. Ct. Crim. R. 61(f) (3).

claims are procedurally barred in this proceeding unless Roth can show cause for relief from the procedural default and prejudice from a violation of his rights,<sup>6</sup> or a miscarriage of justice.<sup>7</sup> We have reviewed these claims carefully and do not find that Roth has succeeded in overcoming the procedural bar.<sup>8</sup> Nor do we find any error or abuse of discretion on the part of the Superior Court in summarily denying Roth's claims as procedurally barred.

(7) As part of his claim of error on the part of the trial judge, Roth claims that certain statements to the Delaware State Police made by a prosecution witness were improperly found to be voluntary and, therefore, admissible at trial. This claim previously was raised by Roth in his direct appeal. There, we determined that there was no error or abuse of discretion on the part of the trial judge in ruling that the statements were voluntary and, therefore, admissible.<sup>9</sup> Because this issue was formerly adjudicated, it is barred in this proceeding unless Roth can demonstrate that reconsideration of the issue is warranted in the interest of justice.<sup>10</sup> We do not find that such reconsideration is warranted. Nor do we find any error or abuse of

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<sup>6</sup> Super. Ct. Crim. R. 61(i) (3)(A) and (B).

<sup>7</sup> Super. Ct. Crim. R. 61(i) (5).

<sup>8</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>9</sup> *Roth v. State*, 788 A.2d at 106-08.

<sup>10</sup> Super. Ct. Crim. R. 61(i) (4).

discretion on the part of the Superior Court in summarily denying this claim as procedurally barred.

(8) Roth next claims that, at trial, the State intentionally violated the witness sequestration order and engaged in discovery violations. Neither of these claims was raised in the proceedings leading to the judgment of conviction. As such, these claims are procedurally barred in this proceeding unless Roth can show cause for relief from the procedural default and prejudice from a violation of his rights,<sup>11</sup> or a miscarriage of justice.<sup>12</sup> We have reviewed these claims carefully and do not find that Roth has succeeded in overcoming the procedural bar.<sup>13</sup> Nor do we find any error or abuse of discretion on the part of the Superior Court in summarily denying these claims as procedurally barred.

(9) Roth next claims that his counsel rendered ineffective assistance. Specifically, Roth argues that his counsel failed to: call the appropriate witnesses; review discovery materials; visit the crime scenes; and object to the State's violation of the witnesses sequestration order and the prosecutor's closing argument. In order to prevail on this claim, Roth must show that his counsel's representation fell below an objective standard

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<sup>11</sup> Super. Ct. Crim. R. 61(i) (3)(A) and (B).

<sup>12</sup> Super. Ct. Crim. R. 61(i) (5).

<sup>13</sup> *Younger v. State*, 580 A.2d at 555 (Del. 1990).

of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>14</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."<sup>15</sup> This Court consistently has held that a defendant must set forth concrete allegations of actual prejudice and substantiate them, or risk summary dismissal.<sup>16</sup> We find no merit to any of Roth's claims of ineffective assistance of counsel because there is no evidence that any alleged error on the part of his counsel resulted in any prejudice to him.

(10) Roth's final claim is that the Superior Court improperly failed to appoint counsel to represent him in postconviction proceedings. There is no constitutional right to the appointment of counsel in postconviction proceedings.<sup>17</sup> However, the Superior Court in its discretion may appoint counsel upon a showing of good cause.<sup>18</sup> The Superior Court determined that Roth's claims were not complex and were lacking in factual support. On those grounds, the Superior Court denied Roth's request for counsel. We

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<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>15</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

<sup>16</sup> *Younger v. State*, 580 A.2d at 555-56.

<sup>17</sup> *Floyd v. State*, Del. Supr., No. 194, 1992, Veasey, C.J. (July 13, 1992)(citing *Ross v. Moffitt*, 417 U.S. 600 (1974)).

<sup>18</sup> Super. Ct. Crim. R. 61(e) (1).

find no error or abuse of discretion on the part of the Superior Court in so deciding.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely  
Justice